

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION**

JOSE LIZARRARAS-CHACON,

Petitioner,

v.

WARDEN B. BIRKHOLZ,

Respondent.

No. CV 23-01865-MEMF (DFM)

Order Accepting Report and  
Recommendation of  
United States Magistrate Judge

Pursuant to 28 U.S.C. § 636, the Court has reviewed the pleadings and all the records and files herein, along with the Report and Recommendation of the assigned United States Magistrate Judge. Petitioner did not file objections. The Court accepts the findings, conclusions, and recommendations of the United States Magistrate Judge to the extent noted below.

Given the passage of time, the question of whether it would be futile for Petitioner to exhaust his administrative remedies (in 2024) is a closer question than when it was considered by the Magistrate Judge (in 2023). The Court therefore finds it prudent to address the merits of the Petition. The Petitioner asserts that there is no evidence in the Respondent's supporting declaration regarding the nature of his convictions—and therefore whether they render him ineligible to receive First Step Act ("FSA") time credits. Even though the Respondent's *declaration* may not contain the requisite evidence, the

undisputed record before the Court does—Petitioner admitted in his Plea Agreement that he was previously convicted of an aggravated felony and that he was eligible for an enhancement as an organizer, leader, manager, or supervisor, and the record indicates that he was found to be an organizer, leader, manager, or supervisor. *See* ECF No. 10 and *see generally* docket in *U.S. v. Lizarraras-Chacon*, Case No. 3:11-cr-00525-HZ (D. Or.). Therefore, the record is undisputed that there are two bases upon which Petitioner is ineligible for FSA time credits.

IT IS THEREFORE ORDERED that Judgment be entered granting Respondent's Motion to Dismiss and dismissing the Petition without prejudice for failure to exhaust administrative remedies and, in the alternative, on the merits.

Date: March 22, 2024



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MAAME EWUSI-MENSAH FRIMPONG  
United States District Judge